The Central Law Journal.

ST. LOUIS, FEBRUARY 15, 1884.

CURRENT TOPICS.

For nearly six years, the power vested in Congress by the Federal Constitution, to provide a uniform system of bankruptcy, has remained dormant; but the bill popularly known as the Lowell Bill, is now in a fair way towards enactment. In a country which has so many different jurisdictions, in each of which the collection of debts is more or less difficult, yet all of which should have a common end, there is a check to commerce of no imperceptible magnitude, while there is a corresponding license to dishonesty and fraud. The returns of no single year have demonstrated, better than those of the year just closed, the needs of a bankrupt law. All the good features of the old law are preserved in the Lowell bill; all the bad features are eliminated. This bill is made up of those provisions of the old Bankrupt Act and the English system, with such additions as the experience of years have demonstrated to be salutary. It is approved, in fact proposed, by the merchants, who, above all classes, are conscious of their needs, and to whose judgment, the utmost deference should be paid. While no essential change in the *modus operandi* is made, the notable features of the bill are the abolition of the offices of register and assignee, and the substitution of supervisors for each circuit, commissioners for each district, trustees for the creditors, and boards of direction. The duties of the first are indicated by their title; the second take the place of the old registers; the third have all the powers of the old assignees, and the last are supposed to protect the interests of the creditors. The two first have fixed salaries; the third receives commissions; the last must do their duty without compensation. The whole system apparently operates like clock-work; the speedy, inexpensive and advantageous settlement of the bankrupt's affairs is the end expected to be attained by this machinery. It seems to us that the calculations of its promoters will not fall very short of the mark. If they do, the remedy is plain and easily secured; but surely no condition of things can be more deplorable than that which reigns today. Let the bill be given a trial, and, if the results are as unsatisfactory as those which attended the operation of the old act, what shall have been done, can very easily be undone.

The editor of the *Albany Law Journal* in his irrepressible desire to be grotesquely humorous has, for once, at least, descended to abuse wholly outside the scope of his contentions. Just now some New York sentimentalists are making a strong effort to secure robes for the judges of the Court of Appeals, and the editor referred to has joined their company. Taking offense at some remark of the *Denver Law Journal*, the funny man retorts, as if it came within ten miles of the question; "It would not hurt our Western communities if their courts were held in higher respect. * * * Better have judges in gowns than lynchers in masks." The very ground upon which the contention for gowns is based is that it would compel the people of New York to look up to the judges with "higher respect." The people appreciate ability as keenly as the bar. If the judges of New York must be dressed in silk before the people will treat them with respect, then we think our Albany cotemporary would be more in place in confining its attention to home necessities, rather than in casting slurs at our Western courts. The Western courts of last resort are held in as high respect by the people as that of New York, and the ability of the Western bench will compare with that of the court, whose members our cotemporary would robe. If there is a marked lack of respect in Western communities for the administration of justice, it is for the verdicts of juries, and not for the opinions of the courts of last resort. Occasionally, the latter make mistakes; and we have freely criticised them; but we have never conceived the idea of concealing their lack of ability, if there be any such lack, by covering them with robes, wherewith to inspire the people with awe. We have no hesitation in saying that we would give more for the opinion of the Supreme Court of Michigan, than for that of New York's pet court, even if its judges were in gowns; yet this is one of the courts which deals with the interests of our Western communities.

The Supreme Court of California has in its late decision, in Biddle v. Brizzola, furnished us quite a valuable contribution to the collection of the authorities made in a recent article in the JOURNAL (Vol. 18. p. 43.) upon the question as to the liability of a purchaser from the mortgagor assuming the payment of the mortgage. While the court reviews all the cases and throughout its opinion leans strongly in favor of the doctrine which obtains in Michigan, Massachusetts and New Jersey, it is a fact worthy of notice that the court nowhere makes a definite declaration of opinion. The court approves the rule that no action at law lies in favor of the mortgagee but declares that the mortgagee is entitled as any creditor to all *existing* securities in the hands of the mortgagor. Herein lies the great point of the case. In the article referred to, it was said to be an unsettled question whether the mortgagor may release his grantee and thus deprive the mortgagee of the security. The court holds that, if he releases the grantee before the mortgagee accepts his promise, the latter can make no objection thereafter. This is placed upon the grounds that "the mortgagee, being the representative of the mortgagor, to enforce the rights of the latter against the purchaser, is entitled only to such remedy as the mortgagor has when the bill is filed and that it is competent for the parties to the agreement to rescind and extinguish it at their pleasure, when it becomes incapable of enforcement by all parties."

The decision of Vice Chancellor Wood of the English High Court, in Heywood v. Mallalieu, carries the duties of a vendor of real estate to a greater extent than what we had heretofore supposed the law demanded. The vendor, at a public sale, stated that the sale was made "subject to all rights and easements of any nature." Yet the court holds that the vendor's failure to disclose a particular easement which was held by a stranger in the house sold, relieved the purchaser from his obligation. This seems to us as carrying the doctrine of constructive fraud to an unreasonable extent and to be an uncalled-for interference with the freedom of contract. With such decisions, the rule of *caveat emptor* will soon disappear.

PARTY WALLS.

The custom of party walls, developed by time and regulated by various statutes, was introduced into this country by the first settlers in Philadelphia under William Penn, and in 1724 the legislature of Pennsylvania passed an act, which is still in force, regulating, in detail, the whole subject of party walls.[1]

What are Party Walls.—Party walls are walls between two estates which are used for their common benefit,[2] as, for instance, in supporting the timbers used in the construction of contiguous houses. Such walls are usually erected on the line between the adjoining estates, but it is not necessary that they should be built half upon each or wholly upon one, and may, or may not, be the common property of the two proprietors, according to the circumstances. The rights of the parties in respect to the wall may be determined from the manner in which they have used the same for the period of time requisite to create a prescriptive right.[3] The common use of a wall separating adjoining lands of different owners is, in the absence of statutory provision or express agreement, *prima facie* evidence that the wall, and the land on which it stands, belongs to such owners in equal moities;[4] and if one adds to the height of such wall and the other pulls down the addition, the former may maintain trespass for his portion thereof. Whether a structure is a party wall is a question of fact and not of law.[5] It may be a party wall to the common height of both buildings, and cease to be such for the rest of its height.[6] A deed conveyed to M certain premises extending to the west line of the west wall of a brick building upon the premises so that it included the whole of the west wall, with the reservation that the owners of the ground on both sides should have the mutual use of the present

[1] Ingles v. Bringhurst, 1 Dallas, 341; Hart v. Kuches, 5 S. & R. 1.
[2] Washb. Real Prop., 334.
[3] Cubitt v. Porter, 8 B. & C. 257.
[4] Brooks v. Curtis, 50 N. Y. 639.
[5] Campbell v. Mesier, 4 Johns. Ch. 334; Schile v. Brokhahns, 80 N. Y. 614; 2 Hill, 148.
[6] Cubitt v. Porter, 8 B. & C. 257; Motts v. Hawkins, 5 Taunt. 20.

partition wall; at that time there was a small one story brick building on the lot adjoining on the west. Subsequently M's grantor conveyed this other lot to P, who tore down this small building and erected one much higher, and extending further along on M's wall. It was held that the reservation in the deed to M extended only to such portions of the west wall as were then used as a partition between the buildings, and that P had no right to the mutual use of any other or greater part of this west wall.[7] In another case [8] the plaintiff had a house, one wall of which was, to the height of the first story, a party wall between the houses of the parties, but above that height had ancient windows opening to the external air; plaintiff pulled down his house and proposed to rebuild, with windows in the same position as before, but had previously given notice to the defendant that the wall, which he described as a party wall, was out of repair; and it was agreed that they should rebuild at their joint expense. Defendant afterward proceeded to erect a building which would obstruct the light coming to the ancient windows of the plaintiff; the court enjoined him from continuing his building, holding that the wall above the defendant's building was not a party wall, and that the plaintiff was not precluded from making windows in it.

The mere fact that a wall stands between two buildings and the timbers of each are supported by the entire wall, does not necessarily make the owners tenants in common of the wall; but if this condition of things continues for the prescriptive period it will become a party wall.[9] A common wall erected by tenants for years may, as between themselves, have the characteristics of a party wall, yet it creates no such easement as will prevent the reversioner, upon the expiration of the term, from dealing with the property as if no such wall had been built.[10] It may be laid down as a general rule, that when the owners of adjoining lots, by mutual consent, construct a wall partly on the land of each for the common support of both buildings, and is so used for the prescriptive period, it becomes strictly a party wall,[11] and each has an easement in that portion which stands on land of the other, and neither can interfere with the others rights. [12]

Use and Destruction.—Each possesses a right to a reasonable use of such wall; [13] such use is mutual and must be exercised with due regard to the rights of the other.[14] Each has a right to place his joints in it, and use it for the support of his roof; the land covered by such a wall remains the property of each, burdened by the easement to which the other is entitled.[15] Each tenement becomes both dominant and servient. The right to enter upon the servient tenement to make repairs can not be abridged. It is properly termed an easement of necessity, and arises out of some act of the owners of the dominant and servient tenement, without which the intention of the parties can not be carried into effect or their rights enjoyed.[16] When the party-wall is interfered with by one, as by raising it, he is liable as insurer for any loss which may be occasioned to his neighbor.[17] Loss of profits resulting from the wrongful pulling down of the wall by one, is allowed as an item of damages if it is such as may naturally be expected to follow from the wrongful act, and is certain, both in its nature and in respect to the cause.[18] In the absence of agreement regulating the height, each may raise the wall if it can be done without injury to the rights of the other, but if the original agreement is for a dead wall, there can be no windows or other openings made in the addition.[19] One can not convert an ancient wall into two separate and distinct structures connected together only at intervals by projecting bricks or ties.[20] It was said by the court, in this case that if the party was allowed to cut off the old wall in part and

7 Price v. McConnell, 27 Ill. 225.
8 Weston v. Arnold, L. R. 8 Ch. App. 1060.
9 Campbell v. Mesier, 4 John. Ch. 334.
10 Webster v. Stevens, 5 Duer, 553.
11 Partridge v. Gilbert, 15 N. Y. 601; Danenhauer v. Deane. 51 Texas, 480; Phillips v. Boardman, 14 Allen, 147; Schile v. Brokhahns, 80 N. Y. 614; Eno v. Vel Vecchio, 4 Duer. 53.
12 Richards v. Rose, 9 Ex. 218; Murchie v. Black, 19 C. B. (N. S.) 190; Aspder v. Seddon, 1 Ex. Div. 496.
13 Brooks v. Curtis, 50 N. Y. 639.
14 Webster v. Stevens, 5 Duer, 553; Partridge v. Gilbert, 15 N. Y. 600.
15 Brooks v. Curtis, *ubi supra.*
16 Partridge v. Gilbert, *ubi supra.*
17 Schile v. Brokhahns, 80 N. Y. 614.
18 Ibid.
19 Danenhauer v. Deane, 51 Tex. 480.
20 Phillips v. Boardman, 14 Allen, 147.

erect a new one, separate from it at a distance of two inches, and connected with it only by occasional supports, he might in like manner erect his new wall at a distance of two feet, or two yards, and connect it with the residue of the wall by ties of wood or stone. After such alteration the plaintiff's estate might be as strong and well supported as before, but it would cease to be upheld or sustained by the ancient party wall, a solid structure, such as plaintiff had from time immemorial enjoyed.

Where two parties, being about to erect dwelling houses on their respective lots, agreed to, and did, build a partition wall for the support of both houses, and after the lapse of twenty years, one of them desiring to erect a better building, after notice to the other, but against his remonstrance, took down his portion of the wall, using proper care to prevent injury to the remaining portion. Notwithstanding such care, it fell down and was destroyed, and it was held that the defendant was not liable.[21] The court did not doubt the correctness of those cases which decide that where the owner of two adjoining lots, erects a structure upon each, with a common, thin partition wall, and conveys the lots to different parties, the right to use the partition wall passes to each grantee as an appurtenance to each lot, and that if either takes down the wall, he becomes liable,[22] but held that the facts in the case before them were distinguishable. It seems difficult to reconcile this decision with those which hold that when a wall has stood for the period of time necessary to create a prescriptive right, neither party can interfere with it (provided it is not in a wasted condition) to the detriment of the other.[23]

It is well established however that when one of the buildings becomes so dilapidated as to be unsafe and unfit for habitation, and the removal of the wall of such building would occasion the destruction of the party wall, then the owner of such building may, upon reasonable notice to the tenant of the adjoining building, lawfully take down the whole wall; and if he occupy no unnecessary time in completing the work, and use proper care in its performance, he is not responsible for the damage resulting from exposure.[24] By an indenture between the plaintiff and defendant, either party was authorized to build a wall, half on the land of each, and demand half of the cost from the other, if he used it. The defendant made a contract with a firm of masons, by which the latter were to build the wall, under the superintendence of an architect employed by the defendant. The masons built the wall, and did everything that was required by their contract; after the wall had been completed and accepted by the defendants, by reason of its defective condition, it fell and crushed the plaintiff's buildings. It was held that the wall was entirely owned by the defendant until the plaintiff should reimburse him for his share of the expense, and for the injury caused to the plaintiff's property, the defendant was responsible, whether he was negligent or not.[25]

Agreements Running with the Land.—There is a conflict of opinion here, some courts holding that agreements to build or pay for party walls are merely personal,[26] and, therefore, do not pass to a grantee, while others hold that they are real and run with the land.[27] This question usually arises when one party builds a wall on the dividing line, under a contract with the other owner, that when the latter uses the wall he will pay to the former one-half the cost of the same. The Massachusetts courts hold that such covenants have a direct and immediate reference to the land; that they relate to the mode of occupying and enjoying the land; that they are beneficial to the owner merely as owner; that they are inherent in and attached to the land and necessarily go with it into the hands of the heir or grantee. But where A, by virtue of a contract with B, builds a division wall

[21] Hieatt v. Morris, 10 Ohio St. 523.

[22] Partridge v. Gilbert, 15 N. Y. 600; Eno v. Vel Vecchio, 4 Duer, 53; Webster v. Stevens, 5 Duer, 553.

[23] Watts v. Hawkins, 5 Taunt, 20; Brooks v. Curtis, 50 N. Y. 639; Danenhauer v. Deane, 51 Texas, 480.

[24] Partridge v. Gilbert, 15 N. Y. 600; Campbell v. Mesier 4 John. Ch. 334, 8 Am. Dec. 570; Brooks v. Curtis, *ubi supra*, 10 Am. Rep.

[25] Gorham v. Gross, 125 Mass. 232.

[26] Block v. Isham, 28 Ind. 37; Cole v. Hughes, 54 N. Y. 444; List v. Hornbrook, 2 W. Va. 340; Curtis v. White, Clarks Ch. Rep. 389; Coffin v. Tallman, 8 N. Y. 465.

[27] Burlock v. Peck, 2 Duer, 90; Ingles v. Bringhurst, 1 Dallas, 341; Todd v. Stokes, 10 Barr, 155; Gilbert v. Drew, Id. 219; Hunt v. Kuches, 5 S & R. 1; Savage v. Mason, 3 Cush. 500; Richardson v. Tobey, 121 Mass. 487; Standish v. Lawrence, 111 Mass. 113; Maine v. Cumston, 98 Mass. 317.

half upon the land of each, and B agrees to pay one-half of the expense of the wall, A acquires no interest in the land of B, and none passes to the grantee of A, which can be enforced against B.[28] In this case it is to be noticed that the adjoining owner did not contract to reimburse A, when he should have occasion to use the wall. It was an express contract, broken when the wall was completed and therefore but a mere chose in action, not assignable. Opposed to this doctrine the courts of New York, and a few others [29] hold that where an owner of land builds a party wall under an agreement with the adjoining owner that when the latter shall use it he will pay the expense of building his portion of the wall the right to compensation is personal to the builder and does not pass by a grant of the land nor does the agreement run with the land of the adjoining owner so as to bind his subsequent grantees. Such courts hold the benefit of a covenant will pass with the land to which it is incident, but the burden or liability is confined to the original covenantor.[30]

A parol agreement for the building of a party wall is within the statute of frauds;[31] it is a contract for an interest in land, an easement which cannot be acquired by parol; and a failure to perform an agreement of this character, however injurious it may be, will not, if the contract remain wholly executory create a cause of action. But if a party builds such a wall upon the faith of the defendant's agreement to pay one half the cost when he uses it, such building is a part performance sufficient to take the agreement out of the statute;[32] and where, under a parol agreement between two adjoining proprietors to jointly build a party-wall they have built a portion of the wall, one party who has prepared his materials and planned his building relying upon the performance of the contract, upon the refusal of the other to proceed, is not limited to a bill for specific performance, but may after notice to the other, complete the wall and recover from him his share of the entire expense.[33]

[28] Joy v. Boston Penny Savings Bank, 115 Mass. 60.
[29] *Ubi Supra.*
[30] Cole v. Hughes, 54 N. Y. 444.
[31] Rawson v. Bell, 46 Ga. 19.
[32] Ibid.
[33] Bindge v. Baker, 57 N. Y. 109.

Contribution.—The common law is singularly obscure upon this subject and the decisions are few, conflicting, and unsatisfactory. It seems certain that the common law does not recognize the right of the owner of land to compel the owner of the adjoining premises to build a party wall nor can either demand contribution from the other for a wall erected in whole or in part on the land of such other person, nor for any incidental benefit the latter may derive from a wall erected upon the land of the builder.[34] The authorities, however, agree that if the wall which has been occupied for the necessary period of time to constitute a strict party wall, be in a state of ruin and requires to be rebuilt, one party can compel the other to contribute to the expense of rebuilding it; but the necessity of the reparation must be obvious and made only after due notice; and if the new wall is made wider or higher, the party building it must bear the expense.[35] The conflicting opinions appear in those cases where one owner makes additions to the party wall for his own convenience, and the other afterwards uses such addition.

In the forum of conscience the rule would be, that the latter ought to pay the former for the benefit thus received by his labor and expenditure, and some of the authorities have so held.[36] When one encroaches upon his neighbor's land by building a wall upon it, he acquires no right to claim contribution from the latter, even if he uses it, without the former's consent.[37] In 1844 a foundation wall was built, one half of which projected on the adjacent lot, no contract having been made between the owners as to the cost. In 1860 the party controlling the adjoining lot erected a house using the wall so projecting and the vendee of the party who originally built the wall brought a suit in chancery for contribution. It was held[38] that when the wall was built it must have been done lawfully or unlawfully; if the latter, no contribution could be claimed; if the former, it must have been done with the assent implied

[34] Urman v. Day 5 Fla., 385; List v. Horn brook, 2 W. Va. 340; Bisquay v. Jenexlot, 10 Ala., 245.
[35] Campbell v. Mesier, 4 John Ch., 334; 8 Am., Dec. 570; Brooks v. Curtis, 50 N. Y. 639; 10 Am. Rep. 545
[36] Richardson v. Tobey, 121 Mass. 487.
[37] Urman v. Day, 5 Fla. 385,
[38] List v. Hornbrook, 2 W. Va., 340.

or express, of the owner of the adjoining lot, and in the absence of proof of any express contract to pay, the defendant's acts could not be construed as an implied contract to reimburse the builder. When a party wall is destroyed by fire there is no implied agreement between the adjoining owners that the wall[39] shall be rebuilt in like manner, on the same foundation; and if one so rebuilds it he cannot compel a purchaser from the othe proprietor to contribute to the cost of the wall or to compensate him for using it; and the custom and practice of lot owners, as to contribution and compensation for the cost of a party wall cannot be shown;[40] and further if one of the proprietors attempts to rebuild the wall thus destroyed, the other party may enjoin him.[41] When two owners of city lots unite in building two stores with a party wall, no inference can be drawn of an agreement, binding upon them and their heirs and assigns, to the end of time, that another shall be erected at their mutual expense when the first is casually destroyed.[42] But when one of the buildings is destroyed, but the wall is left standing the easement is at an end and each owner becomes the owner in severalty of his own soil and of so much of the wall as stands thereon, with a perfect right to tear it down or dispose of it in any way he may see fit.[43] As said by Chalmers, J. a wall is but a portion of a house, and the one is valueless without the other. To hold that so long as the wall stands the owner whose house is destroyed, is compelled to lose the use of his lot or to replace the destroyed building with another of the same pattern, is to sacrifice the greater to the less and to impose in perpetuity a servitude which was assumed only for a specified purpose. Such a doctrine, enforced in the growing towns and cities of America, where localities which are dedicated at one time to residences are swallowed up in a few years by the encroaching demands of commerce, would be intolerable.[44]

F. M. Bixby.

Boston, Mass.

[39] Sherwood v. Ascon, 4 Sandf. 480. Abraham v. Krawtler, 24 Mo. 69; Antomarchi v. Russel, 63 Ala 356; Hoffman v. Kuhn, 57 Miss. 750; 80 Ill. 258.
[40] Antomarchi v. Russel. *Ubi Supra.*
[41] Hoffman v. Kuhn, *Ubi Supra.*
[42] Campbell v. Mesier, 4 John Ch. 334.
[43] Hoffman v. Kuhn, 57 Miss. 750.
[44] Ibid.

LEGACIES GIVEN IN A PARTICULAR CHARACTER.

III.

The same principles as those applied in the case of a bequest to a "wife," when the person claiming under that character was not possessed of it in its strict sense, that is to say, was not the lawful wife, have been applied in the case of bequests to "legitimate children," or to a "child" or "children," which by a presumption difficult to overcome, is held to mean lawful children—the application of these principles, however, being subject to a certain limitation thought to be required by a principle of public policy. Standen v. Standen,[1] is an instance of this class of cases. A testator by his will left a sum to "Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen, now residing with a company of players." The testator bequeathed a moiety of the residue of his estate in trust for Charles Millar Standen and Caroline Elizabeth Standen, legitimate son and daughter of Charles Standen; and if both died before majority or marriage, in trust for "such of the legitimate children of Charles Standen" as should be living at the death of the survivor of these two. The other moiety was given to the testator's wife for her life, and after her death to any persons she might by will appoint, and failing appointment, to "all the legitimate children of Charles Standen living at his decease, share and share alike." Charles Standen, the player, had married, and had one child, Charles Standen. He separated from his wife, married another woman, with whom he lived as his wife till her death, and had issue by her, Charles Millar Standen, Caroline Elizabeth Standen and other children. The questions were (1) whether Charles Millar Standen and Caroline Elizabeth Standen were entitled to the interests given them by name, but under the wrong description of legitimate children; and (2) the testator's widow having died, whether, if the power of appointment by the wife had not been exercised as to the moiety of the residue life-rented by her, these and the other illegitimate children, the offspring of the second union, were entitled to share

[1] 2 Ves. Jun. 589.

with Charles Standen, the only legitimate child. The second question did not require to be decided, as the power of appointment was held to have been duly exercised: but it was held that the bequests to the persons mentioned by name were valid. Lord Chancellor Loughborough said: "As to Charles Millar Standen and Caroline Elizabeth Standen the question is not very great, for a wrong description certainly will not take away their legacies. The argument is a strong one, that if he meant those two as legitimate children, he must mean all subsequent children of the same marriage to be legitimate; and yet I do not know how to bring them in as legitimate children when they are not so."

In many cases, however, persons not called by name have been brought in as legitimate children who were not so. Bequests to a "child" or "children" mean *prima facie* to lawful children, just as a bequest to a "wife" is to a lawful wife.[2] There are, however, two classes of cases in which, although there is no mention of the name, illegitimate children have been held to come in under the character of "children." In Hill v. Crook,[3] Lord Cairns laid down the principles applicable to these cases as follows: "What appears to me to be the principle which may fairly be extracted from the cases upon the subject is this: The term 'children' in a will *prima facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take. But there are two classes of cases in which that *prima facie* interpretation is departed from. One class of cases is where it is impossible, from the circumstances of the parties, that any legitimate children could take under the bequest. A familiar example of that might be given in this way: Suppose there is a bequest 'to the children of my daughter Jane,' Jane being dead, and having left illegitimate, but no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter Jane, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether, the court will hold that those illegitimate children are intended, and they will take under the term 'children.' * * * * The other class of cases is of this kind; where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, any expression of the intention of the testator to use the word 'children,' not merely according to its *prima facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. * * * * Suppose a testator were to say in his will, 'being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter,' I apprehend that no person would hesitate to say that the testator had shown upon the face of his will by the words which he had used his intention in a way that could not be mistaken to use the generic term 'children' so as to include illegitimate children along with legitimate children." In Hill v. Crook, illegitimate children were allowed to come in as "children" of a marriage referred to by the testator in the following circumstances: A man had entered into a second marriage with his deceased wife's sister—a union known and assented to by the testator, the father-in-law. In the will testator spoke of this man, John Crook, as his son-in-law, and devised estates in trust for his "daughter Mary, the wife of the said John Crook," which estates were to go after her death to "the children of my said daughter Mary Crook." In several other places in the will Crook and the daughter were spoken of as husband and wife. The children of the union had been treated by the testator as his grandchildren. On Mary's death the House of Lords[4] held that there was a sufficient designation of the illegitimate children, the offspring of this union, as the intended objects of the testator's bounty, and conse-

[2] See Lord Eldon's remarks in Wilkinson v. Adams, 1 V. and B. 422.

[3] L. R. 6 E. and I. App. 265, (1873.)

[4] Lords Chelmsford, Colonsay, and Cairns.

quently that the bequest to them was valid. It is to be observed that in this case all the children were born in the lifetime of the testator. A very recent case in which an illegitimate child was entitled to a legacy as a "child," the intention of the testator to favor not being able to be fulfilled unless this was done, is that of Smith v. Milledge.[5] A testator bequeathed to "A., the eldest daughter of my deceased daughter S., my gold watch" and other property "in trust for such of the the children of my deceased daughter S as shall attain the age of twenty-one years, absolutely, equally share and share alike, the shares of such of them as shall be daughters to be for their sole and separate use." The deceased daughter S had had three children, the eldest of whom (the daughter A to whom the gold watch was given) being illegitimate, the other two, a son and a daughter, being legitimate. Unless the illegitimate child was included in the term children, there were not "daughters" of S, and the bequest to "daughters" would not have complete effect. Taking this into account, and also the previous mention of A as a daughter, the illegitimate child was held by North, J., to be entitled to succeed. On the other hand, as an illustration of the difficulty of overcoming the legal presumption of the term "children," as meaning "lawful children," we may refer to Dorin v. Dorin.[6] A man who had had two illegitimate children by a woman married her, and the day after the marriage made a will leaving her his estate for life, and giving her power to dispose by will of the property "amongst our children" at her death; and if she made no will, then the property was to be divided between "my children by her." No child was born after the date of the will. The testator lived for some time after, and always treated the two illegitimate children as his own. The House of Lords held that the children took nothing—there being nothing in the will compelling one to give to the term "children" a meaning other than its ordinary legal meaning in order to satisfy an evident intention of the testator. "Supposing," said Lord Cairns, "that it had been in the mind of the testator not to take any notice of these children in his will, or to make any provision for them by his will, but to make a provision for them in some other way, and to use his will to designate merely his wife and any legitimate children who might be afterwards born, would not every word in the will be satisfied? Undoubtedly it would. Therefore you are not able to say that the will upon the face of it constrains you to depart from what is the ordinary and *prima facie* meaning of the word 'children.'"

It may be questioned whether the disinclination to bring in under the character or description of "children" any but lawful children, has not been pushed too far in such a case as that of Dorin v. Dorin. It can hardly be doubted that the testator who made the will immediately after he had made the mother of these children his lawful wife, who according to the laws of some countries—Scotland, for example—would by this act have made the children his lawful children, who had regarded and continued to regard them as his children, meant to favor them, and that his bounty to "my children by her" was not intended to extend merely to possible future children. There is undoubtedly something arbitary in the canon of construction that is applied here. By the mode of construction adopted in this class of cases, the endeavour is not to discover the intention of the testator, but only to avoid going right in the face of the intention. There is great force in the observation of Lord Shelborne in Dorin's Case: "I am by no means sure that the law would not be in a better state than it is in at present if the word 'children' in a will were regarded as large enough when used concerning the children of the testator by a particular woman, to include within its proper and *prima facie* construction any children living at the date of the will who might be recognized by the testator as being his own by that woman, as well as those who might afterwards be procreated between them in actual marriage. But it is perfectly well settled as the law now stands, that the word 'children' in a will means legitimate children, unless when the facts are ascertained and applied to the words of the will some repugnancy or inconsistency (and not merely some violation of a moral obligation or of a probable intention) would result from so interpreting them."

[5] August 4, 1883.

[6] L. R. 7 E. and I. App. 568, (1875.)

The rational principles of construction which ought to be applied in this class of cases have been hampered and arbitrarily restrained in their operation by considerations of supposed public policy disfavoring bequests to illegitimate children. Thus, it is only within recent years that, under a gift to "children," with a clear intention that it should apply to existing illegitimate children, existing illegitimate children could have a claim if the gift had to be extended to future legitimate children, or that a gift to illegitimate children not born at the date of making a will, would stand, even when the union of which they were the offspring was pointed out. Not even yet will a gift to future illegitimate children not *in esse* at the testator's death be held valid. There has been a modification of the old principle applied to this class of cases, and as the law stands in England some extremely fine distinctions have been drawn. In Pratt v. Mathew[7] as we have seen, a legacy to "my wife" was held to belong to the testator's deceased wife's sister, with whom he had gone through the ceremony of marriage, and who at the date of the will was living with him as his wife, and continued so to live until his death. But a legacy in this will "to my children hereafter to be born" was held not to fall to a child born two days after the date of the will, and who, up till the death of the testator, in the following year, was treated by him as his lawful child. It is clear enough that this child, of whom the so-called wife was pregnant, was intended to be favored, and probably the near approach of the birth was the immediate occasion of the will being made. But the prejudice of the law against gifts to future illegitimate children was, at the date of the decision, strong enough to defeat the evident intention of the testator. Lord Romilly, M. R., said:—"It is quite settled that a bequest cannot be made by a man to his future illegitimate children, for they can have acquired no title by repute. It is not necessary to consider whether a gift to the illegitimate children of a woman is valid; that has never been determined."[8] In Pratt v. Mathew, Lord Romily continued:—"It is also clear that illegitimate children cannot take under a gift to children, unless it be quite clear that legitimate children never could have taken under the gift. This it is obvious is not the case here; the gift is 'to my children hereafter to be born.' This would obviously include the children he might have by any subsequent marriage. Lord Romily proceeded:—"But it is contended that this is a designation of the child then about to be born, and it is undoubtedly true that a child *en ventre sa mere* may acquire a name by reputation although illegitimate. But I have found myself obliged to come to the conclusion that this is not such a description of this child about to be born as will enable it to take. I look in vain to find any words which point out an express description of such child. If I found any words in the will importing a child *in esse* or about to be born, I should be able to say that this was a description of the child; this is not so, and there are no words in the will which point to this particular child; it is nothing more than the description of a class. It is true that if this had been the case of a valid marriage and a legitimate child, these words would include the child in existence, and thence it is argued that it will include the illigitimate child in existence when the will was made. But the objection is this: That the illegitimate child in the case supposed would take only as one of a class, and that if the illegitimate child takes by analogy to that rule he must also take as one of a class, but the class of which he is to form one is 'my children hereafter to be born,' which extends only to legitimate children and excludes illegitimate."[9] In short, the operation of the rule against bequests to future illegitimate children defeated what was acknowledged to be the intention of the testator. In several other cases the disqualification of future illegitimate children has been laid down in very absolute terms. In Barnett v.

[7] (*Ante*, p. 511.)

[8] In the case of Medworth v. Pope, 27 Beav. 71, Lord Romilly thought it necessary to decide the question reserved in Pratt's case, laying down generally, that "in respect of future illegitimate children the law will not allow them to take under any description whatever."

[9] This, however, is no longer the law since the decision of the House of Lords in Hill v. Crook, Lord Chelmsford there saying: "I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children being so applied, although after-born illegitimate children must be excluded, and the gift be extended to future illegitimate children."

Tugwell,[10] Lord Romilly said:—"It is admitted that no bequest in favor of after-born illegitimate children can be supported." In Howarth v. Mills,[11] Lord Hatherley, then Vice-Chancellor Wood, held a gift by a woman who had gone through the ceremony of marriage with her deceased sister's husband to be void as to her children born after the date of the will, the words of the gift being "to each and every of my children, legimate or otherwise, which shall be living at the time of my decease."—*Journal of Jurisprudence.*

[10] 31 Beav. 236.
[11] L. R. 2 Eq. 389.

ASSIGNMENT — CORPORATION — POWERS OF DIRECTORS — DEED — SIGNATURE — CONSTRUCTION — SUBSCRIPTIONS TO STOCK—CREDITS.

EPPRIGHT v. NICKERSON.

Supreme Court of Missouri.

1. The directors of an insolvent corporation have no authority to make an assignment for the benefit of its creditors; but the stockholders are the only persons who can object to this unwarrantable exercise of authority; and, if they remain silent, they may, after lapse of time, be taken to have ratified the act.

2. An assignment of a corporation, signed only by its president and cashier, in their own names, but attaching the seal of the corporation, is the deed of the corporation, when they designate themselves as acting in their official capacities in the body of the deed, in their signatures and acknowledgment.

3. Although with a conveyance of personal property, a schedule of the property is furnished, the specific enumeration of property therein does not restrict the general operation of the deed, when it is not referred to therein.

4. Where one subscribes to the capital stock of a corporation, the amount of his subscription to be paid at such times, and in such proportions as the directors may order by "calls," the amount not called in is a credit of the corporation, and passes by a general assignment to its creditors. Therefore, a creditor of the corporation can not recover against the subscriber the unpaid subscriptions.

HENRY, J., delivered the opinion of the court:

This is a proceeding which was commenced in the Johnston Circuit Court against defendant Nickerson by motion under sec. 13, art. 1, ch. 37, Wag. Stats. 1872. Plaintiff obtained a judgment against the bank on the 21st day of February, 1880, and execution was issued on the said judgment, which was returned unsatisfied, and this motion was filed on the 26th day of August, 1880, after the return of said execution. Prior to the judgment in plaintiff's favor in his suit against the bank, on the 24th of January, 1880, the said bank, by order of its directors, made an assignment to Joseph Brown of all its "real estate, goods, chattels, effects and credits," for the use and benefit of its creditors, and said Brown duly qualified and entered upon the discharge of his duty as assignee. Nickerson, at the date of the return in the execution before mentioned, was a stockholder of the bank to the extent of twenty-eight shares, only thirty per cent. of which had been paid, leaving seventy per cent. unpaid, for which no call had been made by the directors. Brown, on his application, was made a party defendant to this proceeding, and filed his answer alleging the facts in relation to the assignment, and claiming, as assignee, the unpaid balance for stock subscribed by Nickerson, who, in his answer, also set up as a defense to the plaintiff's motion, said assignment. Several questions have been elaborately and ably argued by counsel, and we shall proceed to notice them in their proper order. First. It is contended that the assignment was made by the directors without the authority of the stockholders, and was, therefore, *ultra vires* and void. As to the stockholders, if they did not consent, this proposition we think correct. Field on Corporations, sec. 151; Abbott v. American, etc. Co., 33 Barb. Sup. Ct. Rep., 580. In the latter case, this question is elaborately and exhaustively considered both by Sutherland, J., and Allen, J., and on this point we think it sufficient to cite that case and those relied upon by those learned judges in the opinions delivered by them. In the case at bar no stockholder is complaining of the action of the directors, and the only stockholder who is a party to the suit, relies upon this assignment to defeat plaintiff's recovery against him. It does not appear that the stockholders did not consent, nor that any of the stockholders ever complained of the conduct of the directors, and from their silence since 1880, their assent to the assignment may be reasonably refused. The plaintiff himself proved his debt against the bank before the assignee.

It is also urged that the assignment was not properly acknowledged. The assignment and acknowledgment were as follows: "Know all men by these presents that the Warrensburg Savings Bank, a corporation duly incorporated under and in pursuance of ch. 68 of the General Statutes of Missouri, and doing business in the town of Warrensburg, Johnston County, Missouri, in consideration of one dollar to it in hand paid by Joseph Brown, of the same place, does hereby bargain and sell, transfer and assign and deliver unto the said Joseph Brown, all and singular, the real estate, goods, chattels, effects and credits of the said Warrensburg Savings Bank, to have and to hold the same in trust to collect and receive the same and dispose of it and the proceeds, to distribute under and in accordance with the general assignment laws of the

State of Missouri among all the creditors of the said Warrensburg Savings Bank, in proportion to their respective claims. In witness whereof the said Warrensburg Savings Bank has caused these presents to be signed and acknowledged by its president and cashier, and the corporate seal to be attached, this 24th day of January, 1880.

WILLIAM CALHOUN, Pres.
AMOS MORKEE, Cashier.

The Warrensburg Corporate Savings Bank, Warrensburg, Missouri. [Seal.]

State of Missouri, County of Johnston. } ss.

Be it remembered that William Calhoun, President of the Warrensburg Savings Bank, and Amos Morkee, cashier of the same, who are personally known to the undersigned, a notary public within and for the county aforesaid, to be the same persons whose names are subscribed to the foregoing instrument of writing, as parties thereto, this day appeared before me and acknowledged that they executed and delivered the same as their voluntary act and deed, for the uses and purposes therein contained.

Given under my hand and notarial seal, this the 24th day of January, 1880.

J. J. BURNETT,
Notary Public Johnston County, Mo. [SEAL.]

This presents a question of more difficulty. § 354, Revised Statutes, 1879, provides "that every general assignment by a debtor, in trust for his creditors, shall be proved, or acknowledged and certified and recorded in the same manner as is prescribed by law in cases wherein real estate is conveyed." § 743 of the statute, in relation to private corporations, Revised Statutes 1879, declares that "it shall be lawful for any corporation to convey lands by deed sealed with the seal of the corporation, and signed by the president * * * and such deed shall, when acknowledged by such officer to be the act of the corporation, or proved in the usual form prescribed for other conveyances of land, be recorded, etc." In the City of Kansas v. Hannibal, etc. R. Co., decided at the October term, 1882, of the court, but not yet reported, the granting clause of the deed was as follows: "know all men by these presents, that the West Kansas Land Co., by Solomon Houck, president, and Theodore S. Case, secretary, * * has granted * * " The attestation clause was as follows: "In witness whereof we hereunto subscribe our names and affix our seal, this etc.

SOLOMON HOUCK, Pres't. [SEAL.]
[SEAL.] THEODORE S. CASE, Sec't. [SEAL.]
W. K. LAND CO." [SEAL.]

The certificate of acknowledgment was that Houck and Case acknowledged that they executed and delivered this same as their voluntary act and deed for the purposes therein mentioned. The court held the deed to be that of the company, and the acknowledgment sufficient. In the case at bar, the seal of the bank was affixed to the deed. The deed purports to be the deed of the bank. It is signed by the president and cashier in pursuance of the order of the board of directors, the acknowledgment is the same as in the case above referred to, and upon the authority of that case must be held to convey the property embraced by its terms. Hough, J., and I dissented from the opinion of the court in that case, and speaking for myself, I think that the acknowledgment of the deed in question does not meet the requirement of the statute. Judge Hough is also of that opinion.

These preliminary questions disposed of, we are now to consider whether the deed of assignment by its terms, embraced unpaid stock for which no calls had been made, and secured, if embraced by the terms, was it in the power of the bank to assign such demands. It is conceded by counsel for appellant that the language of the conveyance is broad enough to include unpaid stock for which no call has been made (if assignable) unless the scope of the language is limited by the schedule attached to the deed of assignment. The deed does not convey the property by schedule, no reference is made to it, and under such circumstances the expressed language of the deed is not restricted in its meaning by what the schedule contains.

Had the bank power to assign its claims upon a stockholder for unpaid stock for which no call had been made by the directors? A very able argument is made in Mr. Bland's brief in support of the proposition that such credits form no part of of the general assets of a corporation, and are not properly the subject of assignment; *Ex parte* Stanley, 4 De G., J. & S. 407, cited and relied upon by him as a direct authority turned upon the construction of a deed of settlement, one clause of which provided that the board of directors might borrow sum or sums of money for the use of the society on the security of its funds and property, and to cause the funds or property on the security of which any sum or sums should be so borrowed or taken up, to be respectively assigned, etc., as the case might require, by mortgage to the person lending the money. Under that clause the directors assigned all and singular, the capital stock, moneys, estate and effects of the society as security for the repayment of the loan. Lord Justice Bruce said: "In my judgment, to construe the deed of settlement as that it should warrant such an assignment as that, would be to authorize a plain breach of trust, and an act inconsistent with the continuance of the society, and inconsistent, probably with the lawful exercise of the pow of the directors." Lord Justice Turner observed a the same case, that "upon the true construction of this deed of settlement, the subscribed capital not paid up does not constitute funds or property of the society within the meaning of this deed." What he subsequently says with respect to the assignability of unpaid calls due from the subscribers has relation to their assignability to an individual as security for or in payment of a debt. That was not the case of a general assignment by

an insolvent corporation for the benefit of creditors. *In re* Sankey Brook Coal Co., L. R. 10 Eq. 138. was similar to the case of *Ex parte* Stanley, *supra*, and turned upon the construction of a power given, to "pledge, mortgage or charge the works, hereditaments, plant, property and effects of the company, "in order to secure the repayment of moneys borrowed; and it was held that under that power the proceeds of a call already made, but not yet paid, might be charged, but not the proceeds of a future call." To the same effect the Ohio Life Ins. Co. v. Trust Co., 11 Humph. 1. Appellant contends that unpaid stock for which no call has been made, which has been subscribed for under a statute providing that ten per cent. of the nominal value shall be paid presently, and the balance on such calls and terms as the directors may from time to time prescribe, is not a debt *in esse*, but that a call is a condition precedent, and, until made, it is an obligation *in posse* merely, and makes an able, plausible and philosophical argument, based upon the definition of Bouvier, Burrell, Abbott and Wharton, of "*debitum in presenti solvendum in futuri.*" They all define it as substantially a debt due at present, to be paid in future, which is but a translation of the phrase. What is unpaid stock for which no call has been made if not a debt? The obligation to pay it is assumed when the stock is subscribed for, and that it is only payable on call does not make it an obligation *in posse* merely. The contract of the indorser of the negotiable paper is to pay, if the maker does not, on presentment and demand, provided due notice is given him of his default. Is it any the less a present debt because not payable unless demand is made and a payment refused and notice given? If these things are omitted he is absolutely discharged by the law merchant, and yet it is a debt of the indorser, although by neglect of the holder he may never be liable to pay it. The authorities are innumerable which hold the capital stock, paid and unpaid, a trust fund for the benefit of the creditors; and, in the case of an insolvent bank, if the directors refuse or neglect to make calls for unpaid stock, a court of equity may compel the call. This is conceded by Lord Justice Turner in Stanley's Case, *supra*, relied upon by appellant's counsel. In Sagery v. Dubois, 3 Ch. 468, the court says: "Defendant by subscribing stock became liable to pay shares in full when called for by the directors. He might be compelled to pay by the receiver who represented the creditors of the company, notwithstanding the directors had not only failed to call for unpaid balances, but had formally resolved that no further calls should be made." The statute of this State under which this proceeding is allowed against a stockholder, recognizes the unpaid stock, although no call has been made by the directors as a debt due the company. Upon no other principle can the statute stand. The egislature has no power to establish the relation of debtor and creditor between two citizens. If before the act was passed, the stockholder as to unpaid stock, was not a debtor to the bank, the statute could not make him such. He became such by his subscription, and to hold that the corporation by neglecting or refusing to make calls for unpaid stock can release the stockholder from his liability would be to allow them to do indirectly what they could not accomplish by a resolution of the board, directly absolving him from his obligation. We are of the opinion that it was within the power of the bank to assign the debt in question, and think we are fully sustained in this conclusion in the cases of Terry v. Anderson, 5 Otto, 628; Marsh v. Burroughs, 1 Woods, C. C. Rep. 468. In this case Bradley, J. observes: "It is contended that the unpaid subscription of capital stock are not assets for the payment of debts, either legal or equitable; that they exist merely as possibilities; that they are not a debt due, having never been called in; that no one can call them in but the directors; and in them it is merely discretionary power which can not be exercised either by the assignee, the receiver, or the court itself, and can not be assigned. This position may be somewhat plausible, but it is not sound. It is not a mere power vested in the bank to make further calls. It is a right, and when a debtor has such right, and does not choose to exercise it, equity, at the instance of creditors, will exercise it for him. Westchester R. Co. v. Thomas, 2 Phila. 344; Lionberger v. Broadway Saving Bank, 10 Mo. App. Rep, 499." We have thus particularly noticed the case in 1 Woods, because appellant's counsel had cited and rely upon it as authority in support of their views. In addition to these express authorities all these cases are in point which hold that the capital stock of a corporation is a trust fund held by the corporation for the benefit of all its creditors. Powell v. N. M. R. Co., 42 Mo. 68; Germantown Pas. Ry. Co. v. Fitter, 60 Penn. St. 124; Wood v. Dummer, 3 Mason, 308; Webster v. Upton, 91 U. S. 65; Sawyer v. Hoag, 17 Wall, 621; Sagens v. Dubois, Sanf. Ch. 466; 13 Wis. 62; 2 Dillon 106; 3 Mason, 308. We might extend this list almost indefinitely, but the cases will be found cited in the elementary works. The cases of Gross C. Hotel Co. v. l'Anson's Exor. 13 Vroom. 10. * * was a suit at law to recover money alleged to be due from the testator on a subscription for capital stock of plaintiff; no assessment of this stock had been made and it was properly held that no suit at law could be maintained until a call was made; until then it was not payable. The same may be said of Chandler v. Siddle, 10 Nat. Bank Register, and in fact that principle underlies nearly all the cases cited by the counsel for appellant. Hannah v. Moberly Bank, 67 Mo. 679, and other Missouri cases cited, and to the same effect.

The judgment of the circuit court which was for defendant is affirmed. All concur.

NOTE.—1. The first point seems to be opposed to the authorities. It is held in a large number of cases that the directors may make an assignment of the

property of the corporation without the express authority or consent of the stockholders: Dana v. Bank of the United States, 5 W. & S. 223; DeCamp v. Alward, 52 Ind. 468; Sargent v. Webster, 13 Met. 497, per Shaw, C. J.; Catlin v. Eagle Bank, 6 Conn. 23; Union Bank v. Ellicott, 6 Gill. & J. 363; Merrick v. Bank of Metropolis, 8 Gill. 59; *Contra* in Bank Commissioners v. Bank of Brest, 1 Harr. Ch. 106. See Haxtam v. Bishop, 3 Wend. 13; Hill v. Reed, 16 Barb. 281; State v. Bank of Md., 6 Gill. & J. 219; McCallie v. Walton, 37 Ga. 612; Flint v. Clinton Co., 12 N. H. 435; and in Gilson v. Golthwaite, 7 Ala. 281, it seems to be assumed that such power exists. But the president cannot; Ib; but the cashier of a bank has implied author to make a transfer the paper securities; Everett v. United States, 6 Port. 66.

2. The general rule of law is that to make the act of the agent the act of his principal, it must be executed in his name; McTyler v. Steele, 26 Ala. 487. It must appear both in the body and signature to be the deed of the principal; Carter v. Chandron, 21 Ala. 72. The decision of the court seems to us to be in conflict with the authorities. The tendency has been to strictly construe deeds with respect to their signatures, and the principal's name must appear in the signature as the contracting party. Thus, a covenant of warranty, executed by J H (seal), attorney for L S, and running in the name of J H alone, is the covenant of J H and not of L S; Skinner v. Gunn, 9 Port. 305. A contract signed W H E, agent for M. etc. R. Co., is contract of agent; Crutcher v. M. etc. R. Co., 38 Ala. 579; Dawson v. Cotton, 26 Ala. 591. But see Carter v. Chandron, 21 Ala. 72. And where the contract was made between the town of E and another, but the members of the town council signed the contract individually, it was held that the town was not bound. Hall v. Cockrell, 28 Ala. 507. But if the covenant is executed by "S R M for B M," it is the covenant of B M. Stringfellow v. Marriott, 1 Ala. 573; Mahoney v. Kekule, 14 C. B. 399, 18 Jur. 313; Desland v. Gregory, 2 El. & El. 602, 6 Jur. 651. A bond signed D H (seal) for J H and T R, is the bond of J H and T R, although there is but one seal. Martin v. Dortch, 1 Stew. 479. So a deed signed "for J B," "M W" is the deed of J B. Wilks v. Beck, 2 East. 142. See Hall v. Cockrell, 28 Ala. 507. And there seems to be a growing tendency to relax the rigid rules of the law in this regard. Thus a mortgage signed by J S, president of an association, is in form executed by the association. Murphy v. Welch, 128 Mass. 489. See Robbins v. Butler, 24 Ill. 387; Clements v. Macheboeuf, 92 U. S. 418. See Vol. 3 Am. Jur. 71-85; where the cases are collected. The acknowledgement will not be taken by itself, but will be construed in connection with the body of the deed. Robinson v. Mauldin, 11 Ala. 977. For the doctrine of *descriptio personae* as applied to promissory notes, see the article of Wm. F. Elliott, Esq., 16 Cent. L. J. 342.

3. While it is the general rule that contemporaneous writings must be taken together, and the meaning taken which is consistent with all, the decision of the court is undoubtedly correct. The effect of a reference to a schedule, however, is quite important. If the assignment conveys all the debtor's goods, credits and effects, which are more particularly and fully enumerated in the schedule thereto annexed, a sum of money, not specified therein was held not to pass. Mines v. Armstrong, 31 Md. 87; Wilkes v. Ferris, 5 Johns. 335. See United States v. Howland, 4 Wheaton, 108; Shultz v. Hoagland, 85 N. Y. 464; Rundlett v. Dale, * N. H. 458; Beard v. Kimball, 11 N. H. 471; Driscoll v. Fiske, 21 Pick. 503; Wood v. Rowcliffe, 20 L. J. N. S. Exch. 285, s. c. 5 Eng. L. & Eq. 471. But the contrary is held in New York. Turner v. Jaycox, 40 N. Y. 470. But see Hotop v. Neidig, 17 Abb. Pr. 332; Birchell v. Strauss, 28 Barb. 293. But a mortgage of a factory, machinery, etc., more particularly enumerated in the inventory attached thereto, does not include stock in trade described in the inventory, but not mentioned in the mortgage. *Ex parte* Jardine, 23 W. R. 382; Aff. on Appeal, 23 W. R. 736.

4. A general assignment passes everything in its nature assignable. Burrill on Assignments, 137. An assignment of all the property of the debtor, is sufficiently specific to give a good title. Robinson v. Rapelye, 2 Stew. 86; England v. Reynolds, 38 Ala. 370; Brown v. Lyon, 17 Ala. 659. To pass by an assignment, a thing must have an existence, actual or potential, at the time of such grant or assignment. Mitchell v. Winslow, 2 Story, 630. But the assignment of a future or contingent debt is effectual to pass the property therein. Percy v. Clements, 22 W. R. 803; 30 L. T. N. S. 264. So of an agreement by a party to a suit t pay a proportional part of a verdict when recovered. Burkett v. Moses, 11 Rich. (S. C.) L. 432. So, of an agreement to pay a certain sum to a party, if he will withdraw his defense passes. Gray v. Garrison, 9 Cal. 325. So of a contract of indemnity. Fletcher v. Piatt, 7 Blackf. (Ind.) 522. So a promise to pay money out of a certain debt "when collected" is assignable, McKernan v. Mayhew, 21 Ind., 291. By an assignment of all goods named in a schedule, goods not yet bought will pass. Sutton v. Bath, 1 F. & F. 152. So of growing crops; Robinson v. Maudlin, 11 Ala., 977; Bellamy v. Bellamy, 6 Fla., 52; Cochran v. Paris, 11 Gratt, 348; Montgomery v. Kirksey, 26 Ala., 172, or of a right to recover against an agent for losses by his neglect. Shultz v. Christman, 6 Mo. App. 338. So of claims upon t government Merriwealth v. Herman, 8 B. Mon., 162. The right to sue for unliquidated damages passes by assignment Wright v. Fairfield, 2 B. & Ad. 727. So the right to sue for damages for breach of a contract for personal service passes to the assignee. Beckham v. Drake, 2 H. L. Cas., 579; 8 M. & W. 845; 11 Id., 315. So where two persons in consideration of a sole trader taking them into partnership agreed to pay a certain sum in installments, the assignees are entitled to receive the same as they fall due. Akhurst v. Jackson, 1 Swans., 85. But the right to sue for property in adverse possession of another is not assignable. Stogdell v. Lugate, 2 A. K. Marsh. (Ky.) 136. Nor a vendors lien. Inglebart v. Armiger, 1 Bland, (Md.) 519. The fact that the charter of a corporation authorizes sales of stock for unpaid calls, does not prevent the corporation from suing in assumpsit, Carlisle v. Cawhawba, R. Co., 4 Ala. 70, nor that it declares that upon non-payment his stock shall be forfeited. Selma & O. R. R. Co. v. Tipton, 5 Ala. 787. Verbal notice of call is sufficient. Smith v. Bank Rd. Co. 30 Ala. 650. [ED. CENT. L.

CONTRACT—TO PAY STRANGER TO CONSIDERATION—INFANCY—ACCEPTANCE BY STRANGER—RESCISSION BY PARTIES—NOTICE—RECORD—VENDOR'S LIEN—ACTION.

PRUITT v. PRUITT.

Supreme Court of Indiana, Dec. 11, 1883.

A, in a conveyance of land to him from B, agreed to pay C, B's son, a certain sum as part of the purchas

money. After the deed was recorded, and before the son was aware of the arrangement, A reconveyed to B, and the contract was rescinded. B then conveyed to D, who was ignorant of all these proceedings, receiving full value. *Held*, (1.) That the promise of A was binding upon him as soon as accepted by C. (2.) That the latter being a minor, the law implied an immediate acceptance, it being for his benefit, and, therefore, it became irrevocable. (3.) That a vendor's lien was created upon the land in C's favor. (4.) That the record of the deed sufficiently apprised D of C's rights. (5.) That C might maintain an action in his own name to enforce the lien.

Francis T. and *Wm. B. Hord*, attorneys for appellant; *George W. Cooper*, attorney for appellees.

Appeal from Bartholomew Circuit Court.

Hammond, J., delivered the opinion of the court:

This was an action by the appellant against the appellees to enforce a lien alleged to exist upon real estate, in favor of the appellant, by virtue of a conveyance from Nancy Pruitt to the appellee Alexander Pruitt.

The complaint alleges that Nancy Pruitt, who was the mother of the appellant, and the appellee, Alexander, being the owner of the real estate in controversy, conveyed the same to said Alexander, by warranty deed, on the 12th day of Nov. 1880. The deed after the description of the real estate contains the following provision respecting the payment of the purchase money. "The consideration to be paid for said tract of land is this to-wit: That said Alexander Pruitt is my son, and in consideration of the affection I bear him, and the further consideration that the said Alexander Pruitt is to pay to my son, Joseph Thomas Pruitt, the sum of three hundred dollars when the said Joseph Thomas arrives at the age of twenty-one years, which the said Alexander Pruitt hereby obligates himself to do; and that said Nancy Pruitt is to have the possession, use and benefit of the said tracts of land so long as she shall live, free of any charge, rent or other obligation whatever." The appellee, Alexander Pruitt, accepted said deed, and as an evidence of his acceptance thereof, and his agreement to pay the appellant the sum specified at the time named, signed his name to said deed and joined with the grantor in the acknowledgement of its execution. He also caused said deed to be duly recorded.

At the time of said conveyance the appellant to whom the purchase money was to be paid, was only five years of age. He obtained his majority Oct. 9th, 1876. Nancy Pruitt died in 1874. The appellees, Nevitt and Isenogle, became the owners, of the land by purchase of the conveyance to said Alexander. At the time of bringing this action said Alexander was, and had been for a number of years, of age prior thereto, a non-resident of the State, and had no personal property in the State. The complaint averred that the amount to be paid the appellant by the terms of the deed with interest after his majority was due and unpaid. The appellees demurred jointly and severally to the complaint for want of sufficient facts. These demurrers were overruled and proper exceptions saved.

As they have assigned as cross errors, the overruling of these demurrers, they will be noticed before proceeding to the consideration of the errors assigned by the appellant. No objection to the complaint is urged in behalf of the appellee, Pruitt. As to the other appellees, two objections are made against the complaint, first, that it does not aver that said appellees were the owners of the land at the time of bringing the action; and, second, that no demand before suit is alleged. These objections are not well taken. The complaint avers that the appellees Nevitt and Isenogle, became the owners of the land by purchase, after the conveyance from Nancy to Alexande. Pruitt. The contrary not appearing, the presumption would be that their ownership still continued. The complaint as to them, only authorized a judgment *in rem*. If they had ceased to own the land no judgment could be rendered that would harm them.

No demand before suit is necessary, when the time for payment is fixed in the contract. Frazee v. McCord, 1 Ind. 224; Ferguson v. State, (No. 9012 decided May term, 1883.) The contract embraced in the deed, upon which the appellant predicates his action provided for the payment of three hundred dollars to him on his arriving at the age of twenty-one years. Thus the time of payment was fixed. It was ascertainable by inquiry and no demand was necessary. The provisions in the deed that the grantee should pay the appellant the sum named, and the acceptance of the deed by the grantee made the latter personally liable for its payment.

This sum, being the unpaid purchase money of the land, became a lien thereon in favor of the appellant. Jones on Mortgages, secs. 205 and 214.

The record of the deed showing that the purchase money was unpaid, and that it was payable to the appellant, was constructive notice to the appellees, Nevitt & Isenogle, as subsequent grantees. Crosby v. Chapman, 26 Ind. 333; Sample v. Cochran, 84 Ind. 594.

The complaint states a good cause of action against the appellees, and there was no error in overruling the demurrers thereto. The appellees Nevitt and Isenogle answered, in four paragraphs, the last being the general denial. The appellee Pruitt answered in one paragraph. The appellant demurred to the first, second and third paragraphs of the answer of Nevitt and Isenogle, and also to the answer of Pruitt. These demurrers were overruled. A reply was then filed. Trial by the court, finding for the appellees, and judgment on the finding, over the appellant's motion for a new trial. The assignment of error challenges the correctness of the overruling of the demurrers to the special answers, and the overruling of the motion for a new trial. The facts stated in all the special paragraphs of the answer were to the same effect, and substantially as follows: When Nancy Pruitt made the conveyance to Alexander

Pruitt, the appellant was only five years of age. On September 11, 1867, before the appellant had any knowledge of the provision made in the deed in his behalf, said Nancy and Alexander by mutual agreement, rescinded their said contract and in consideration of said sum of $300, which Alexander was to pay to the appellant, he re-conveyed by warranty deed said real estate to said Nancy, which she accepted in full payment of said sum and released said Alexander from his agreement to pay the sum to the appellant. The answers of Nevitt and Isenogle also aver that after the reconveyance by Alexander to Nancy they purchased the real estate of the latter, paying her full value therefor, without any actual notice of the appellant's claim. The question is, whether, under the facts stated, Nancy's attempted release of Alexander from the payment of the sum stipulated in his deed from her to be paid to the appellant, had the effect intended.

The delivering of the deed to Alexander containing the provisions for paying the purchase money to the appellant became as to Mrs. Pruitt an executed gift of Alexander's promise to pay the purchase money to the appellant.

The placing of the deed upon record operated in favor of the appellant as well as the grantee. From the beneficial character of the provision for the appellant, an acceptance may be presumed. In the case of a minor no formal acceptance of a gift is required to make it binding.

The law implies an acceptance even though the infant be ignorant of the gift. It becomes binding and irrevocable as soon as it passes from the control and dominion of the donor. Stewart v. Weed, 11 Ind. 92; Rinker v. Rinker, 20 Ind. 185; Wyble v. McPheters, 52 Ind. 393; Baker v. Williams, 34 Ind. 547; Williams v. Walton, 8 Yerger (Tenn.) 387; (29 Am. Dec. 122;) Minor v. Rodgers, 40 Conn. 512; (16 Am. Rep. 69;) Kerrigan v. Rantigan, 43 Conn. 317.

In Howard v. Windham, Savings Bank, 40 Vt. 597, one Almira Goddell deposited of her own money $200, in the bank, in the name of her niece Adaline F. Brown, a married woman, who died without knowledge of the deposit. Almira Goddell afterwards died, and the deposit book was found among her effects. It was held that the money was so transferred and delivered by the deposit as to place it beyond the control of the donor and that the gift was perfected.

It is well established law that when a gift is consummated, it is irrevocable except by the consent of the donee. We must, therefore, conclude that, in the case before us, the gift was executed and that it was therefore, beyond the power of Mrs. Pruitt to discharge her son Alexander from the payment of the debt. Our own reports furnish two cases strongly in support of the validity of the appellant's claim. The first to which we refer is Mallett v. Page, 8 Ind. 364. In that case, a father directed his son to execute two notes for $125 each to his infant daughter and to secure the same by mortgage and real estate, which the father promised to convey to the son. The notes and mortgage were accordingly executed and made payable to the daughter and delivered to the father to be kept until he should execute the deed to the son. The mortgage was placed on record. The father and son afterwards changed their minds. The father entered satisfaction of the mortgage of record and the contract between the father and son was regarded as rescinded. The daughter married and in a suit by her and her husband on the notes and mortgage, it was held that they were entitled to recover. It was said in that case: "We are of the opinion that the notes and mortgage should be sustained. It may be very true that the father changed his mind, but it does not thence follow that the rules of law should be accommodated to his change of opinion." It is true that case is criticised in West v. Carvins, 74 Ind. 265; but the criticism itself is authority in favor of the appellant in the case at bar. Speaking of the decision Mallett v. Page, *supra*, the court in West v. Carvins, *supra*, said: "If the father had made a binding contract with the son to convey the land, and in consideration of that contract the son had executed the notes and mortgage, the transaction would have been entirely valid and binding on all the parties and the conclusion of the court on the whole case clearly right."

The condition which it is said would have made the decision in that case right, existed in the case before us. Here the mother made the contract with her son binding by an actual conveyance to him of the land, in consideration of which he promised, by the acceptance of the deeds to pay the appellant the sum sued for. When this was done and when the deed containing the agreement to the appellant was placed on record, this act itself amounting to a *prima facie* delivery of the contract to the appellant, then the matter passed beyond the control of the mother and the subsequent attempt by her and Alexander to rescind the contract, did not affect the appellant.

The other case to which we refer is Henderson v. McDonald, 84 Ind. 149. In that case Mary Pray, being the owner of certain real estate, joined with her husband in a deed of the same to their son Leander. At the same time Leander entered into a written contract with his parents, securing the same by mortgage on the real estate conveyed to him, to the effect that, in consideration of the conveyance he would support and pay them fifty dollars each during their natural lives, and also that in one year after the death of both, he would pay his Sister Mary, afterward married to Henderson, the sum of $700. Leander performed his contract with respect to his parents. His father died in 1866. After his death, Leander's mother, for a valuable consideration, satisfied the mortgage of record. Leander, after this conveyed the land for value to McDonald. The mother died in 1876. When the mortgage was ex-

ecuted, the parents were not in any way indebted to their daughter Mary. Before the release of the mortgage, Mary had noticed that some provision had been made by her parents to pay her $700, and she executed to one Hopkins a power of attorney authorizing him to collect it for her. More than a year after the death of her mother, Mary brought suit against McDonald to set aside the satisfaction of the mortgage, and for its foreclosure. This court decided in her favor, saying: "The provision having been made upon a good and upon an executed consideration, was irrevocable by the parties who made it. Consequently the so-called release of the mortgage, entered on the record of it by Mary Pray, did not release the mortgagors from the payment of the money secured by it to the plaintiff, nor discharge the lien created by the mortgage in favor of the plaintiff. The provision made for them by her parents was neither a gift *inter vivos*, nor a donation *causa mortis*, but was a settlement of a portion of her mother's estate upon her, somewhat in the nature of a bequest, and in such a beneficial way as to require no express acceptance upon her part. The acceptance of such a provision will be presumed in the absence of evidence of a refusal to accept it." We are of the opinion that the special paragraphs of the appellees' answers setting up the attempted cancellation of the agreement between Mrs. Pruitt and the appellee Alexander did not state facts sufficient to constitute any defense to the appellant's action. The demurrers to such answers should have been sustained. As the judgment will have to be reversed, other alleged errors need not be considered.

Judgment reversed, with instructions to the court below to grant a new trial, to sustain appellant's demurrers to the 1st, 2nd, and 3d paragraphs of the answer of Nevitt and Isenogle and to the answer of Pruitt, and for further proceedings in accordance with this opinion.

NOTE.—1. It has long been a troublesome question whether a promise may be enforced by one who is not only a stranger to the contract but also a stranger to the consideration, but when the promise is made for his benefit. The conflict in the cases upon the question whether a mortgagee may maintain an action against the purchaser from the mortgagor, assuming the payment of the mortgagee was pointed out, *ante*, 42, and how some courts hold that such an action is maintainable. It does not follow that the same answer should be returned upon the general question. When one is under a legal obligation to another, and a third person steps in, receives the consideration of such obligation, and then voluntarily assumes it, there is ground for upholding such assumption, outside of the general doctrine that a creditor is entitled to all the securities which come to the hands of the surety. In the principal case there was an element which relieves it of all objections even from that quarter where the most conservative doctrine obtains. The promise was made for the benefit of the promisee's child. In Dutton v. Poole, 1 Vent. 318, where the defendant promised the plaintiff's father to pay her a sum if he would refrain from doing an act, and the action was sustained. This case was overruled in England by Tweddle v. Atkinson, 1 B. & S. 392, but in this country it has been sustained. Felton v. Dickinson, 10 Mass. 287; Farley v. Cleveland, 4 Cow. 432. It is admitted everywhere that where one person receives money, under a promise to pay it to him to whom it is due, the latter may bring suit for it; Mellen v. Whipple, 1 Gray 317; or where the promisee is treated as the agent of the third person when he is not; Treat v. Stanton, 14 Conn. 445. In Pennsylvania the rule is stated to be that an original promise to one for another's benefit, may be enforced by the latter, but a promise to indemnify a debtor cannot be enforced by the creditor because it would subject him to a double action; Finney v. Finney, 4 Harris, 380; Ramsdale v. Horton, 3 Barr, 330; Guthrie v. Kerr, 4 Norris, 303. Thus when one of two partners assumes the payment of the firm debts, the creditors have no remedy upon his bond; Shoemaker v. King, 4 Wright, 107; Merrill v. Green, 55 N. Y. 270; Manny v. Frasier, 27 Mo. 419. But compare Bellas v. Tagely, 7 Harris, 273. See Lehow v. Simonton, 3 Col. 346. When a sublessee promises to pay the lessor the rent he may be sued by the latter; Brewer v. Dyer, 7 Cush. 237. But the general proposition has now universally obtained, *i. e.* that all promises made by one to another, for the benefit of a third, entirely independent of relationship, may be enforced by the third person. See Simpson v. Brown, 68 N. Y. 335; Barker v. Bucklin, 2 Denio, 45; Thompson v. Thompson, 4 Ohio St. 353; Putney v. Farnham, 27 Wis. 187; Kollock v. Parcher, 52 Id. 393; Davis v. Calloway, 30 Ind. 112; Carter v. Zenblin, 68 Id. 436; Fisher v. Wilmuth, Id. 449; Campbell v. Patterson, 58 Id. 66; Clodfelter v. Hullet, 72 Id. 141; Fitzgerald v. Barker, 70 Mo. 687; Beardles v. Morgner, 4 Mo. App. 139, 573; Allen v. Thomas, 3 Metc. (Ky) 198; Smith v. Mayberry, 13 Nev. 427; Association v. Magnier, 16 La. Ann. 338. But see *contra*, Warren v. Batchelder, 15 N. H. 129; Hall v. Hunton, 17 Vt. 244; Field v. Crawford, 6 Gray, 116; Exchange Bank v. Rice, 107 Mass. 39; Owen v. Owings, 1 Har. & G. 484; Ross v. Milne, 12 Leigh, 204; *In re* Empress Engineering Co., L. R. 16 Ch. 125.

2. As to the second question, the law has not always implied an acceptance of a promise or gift in a minor's favor. When a minor has the power of election between the two gifts, a court of equity has always been resorted to make the election for him. A promise to pay a third person a sum of money, when he does not furnish any of the consideration, must always be for his benefit; then why should not the law imply such acceptance by adults as well as infants? It seems strange that a promise which is made to a party furnishing all the consideration, and transferred to a third by way of gift should not be capable of retraction before delivery of the gift; at least before the third person hears of it. The Supreme Court of California held, as we pointed out this week that such power exists. See Current Topics, 140. The Supreme Court of Indiana has itself held that until acceptance by the stranger, the parties to the contract may rescind it. Davis v. Colloway, 38 Ind. 112. See Kelly v. Roberts, 40 N. Y. 432; Kelly v. Babcock, 49 Id. 318.

3. When the deed under which the vendee holds shows by its recitals that the purchase money has not been paid, a subsequent purchaser has notice of it, even though the deed is not recorded. Cordora v. Hood, 17 Wall. 1; Masich v. Shearer, 9 Ala. 226; Tiernan v. Thurman, 14 B. Mon. 277; Daughaday v.

Paine, 6 Minn. 443; McRunnion v. Martin, 14 Tex. 318; Willis v. Gray, 48 Tex. 463. The generally prevailing doctrine is that the lien can exist only in favor of the vendor and must be raised by implication of law. 1 Jones on Mortgages, sec. 212, and numerous cases cited. But where the vendee at the vendor's request agrees to pay to the third person a portion of the purchase money, the lien continues. Francis v. Wells, 2 Col. 660; Mitchell v. Butt, 45 Ga. 162; Latham v. Staples, 46 Ala. 462; Campbell v. Roach, 45 Ala. 462, thus supporting the decision in the principal case. *Cf.* Buckland v. Pocknell, 13 Sim. 406; Dixon v. Gay, 17 Beav. 421; 21 Ib. 118. [ED. CENT. L. J.]

WEEKLY DIGEST OF RECENT CASES.

1. ACTION—PREMATURE.
Where one agrees to deliver goods in two instalments, each at stated times, a failure to deliver the first instalment may be treated by the vendee as a rescission of the contract, and he may thereupon bring his action for damages without waiting for the non-delivery of the second instalment. *Hill v. Chapman*, S. C. Wis., Jan. 8, 1884; 18 N. W. Rep., 160.

2. ADMINISTRATION—ASSETS IN FOREIGN JURISDICTION—DEBTS.
For the purpose of founding administration, a simple contract debt is assets where the debtor resides, even if a bill of exchange or promissory note has been given for it, and without regard to the place where the bill or note is found or payable. 2. But the debts due from the United States are not assets at Washington alone. *Wyman v. United States*, U. S. S. C., 12 Wash. L. Rep., 35.

3. ASSIGNMENT OF LEASE—SUBSEQUENT RENEWALS.
An assignment of a lease by the tenant carries with it a clause giving the tenant the option to renew the lease at the end of the term, as well as all other clauses therein. *Sutherland v. Goodnow*, S. C. Ill, Reporter's Head Notes.

4. CHATTEL MORTGAGE — VALIDITY — USURIOUS NOTE.
Where a chattel mortgage on its face and by its terms is given to secure a usurious note, but the note secured by it expresses a legal rate of interest, the mortgage is only apparently and not in fact usurious, and therefore is valid. *Ward v. Anderburg*, S. C. Minn., 17 Rep., 51.

5. COMMON CARRIER—BOUND TO CARRY FREIGHT CARS—WHO IS.
A railway corporation whose chief business is to transfer cars of other railroad companies from a transfer switch where left, to other points in the vicinity to be unloaded by the consignees and to return these other cars either empty or loaded, to the other companies for shipment, is a common carrier and subject to all the liabilities of such. *Peoria, etc. R. Co. v. R. Co.*, S. C. Ill., Jan. 23, 1884, Reporter's Head Notes.

5. CONSTITUTIONAL LAW — IMPAIRMENT— OBLIGATION OF CONTRACTS.
It is within the just scope of legislative power to require bondholders interested in common with others in a trust security to signify their assent to or dissent from a plan proposed by proper persons for a compromise and adjustment of matters of difference affecting their common interests; and a statute providing that such agreement, if entered into, shall bind only those bondholders who assent in writing thereto, and in case any bondholder shall fail to file with the president of the corporation his or her refusal in writing to concur in the said agreement within three months thereof, such bondholder shall be taken to have assented to the same, does not impair the obligation of the contract and is valid. *Gilfillan v. Union Canal Co.*, U. S S. C., Nov. 26, 1883, 3 S. C. Rep., 304.

6. CONSTITUTIONAL LAW — STATUTORY RIGHTS — REPEAL OF STATUTE.
An act which permits a wife to sell her separate estate, and thereby deprive her husband of curtesy which he had acquired previous to its enactment, is constitutional. *Moninger v. Kitner*, S. C. Pa., 15 W. N. C., 99.

7. CONTEMPT—THREATENING GRAND JURY.
An attorney is guilty of contempt for sending to a grand jury, while engaged in the discharge of its duties, an accusatory and threatening letter, for the purpose of exasperating the jurors by the aspersions upon their official conduct which it contained, or of deterring them from performing their duties by the threats of public clamor which it expressed, or of creating a distrust and want of confidence in any action which might be taken as the result of their investigation. *In re Tyler*, S. C. Cal., Jan. 15, 1884, 1 West. C. Rep., 337.

8. CORPORATION—INDIVIDUAL LIABILITY OF STOCKHOLDER—RIGHT TO SUE EACH OTHER.
One stockholder can not maintain an action at law on the individual liability of a fellow stockholder any more than one partner can sue his co-partner at law on a claim against the firm, which he may have purchased. *Thompson v. Meisser*, S. C. Ill., Jan. 23, 1884, Reporter's Head Notes.

9. CRIMINAL LAW—BURDEN OF PROOF.
On the trial of three for burglary, where one claims that although he accompanied the other two and with them entered the house, he was acting merely as a detective to fasten the guilt on the others, if the evidence tending to prove this fact is sufficiently strong to raise a clearly well-founded doubt of his guilt, he ought to be acquitted. *Price v. People*, S. C. Ill., Jan. 23, 1884, Reporter's Head Notes.

10. CRIMINAL LAW—EVIDENCE—HOMICIDE—SELF-DEFENSE—CHARACTER OF DECEASED—STATEMENTS OF THIRD PERSONS.

Evidence of character of the party assaulted, in trials for homicide, where self-defense is set up, may be given by defendant to show that he was justified in believing himself in danger of losing his life, or of sustaining serious bodily injury from the deceased. Such proof is admissible when it will serve to explain the actions of the deceased at the time of the killing, which actions must first have been established. *Moore v. State*, S. C. Tex., Tyler Term, 2 Tex. L. Rev., 478.

11 CRIMINAL LAW—LOTTERY.

Selling packages of tea with prize tickets in each, is keeping a lottery, although the tea is worth the price paid. Eng. H. Ct. Q. B. Div. 48 J. P. 36.

12. CRIMINAL LAW—RIGHTS OF PASSENGERS—STOPPING THE MAIL.

A person who is entitled to travel on a railway car may go upon the same peacefully, and remain therein until he arrives at his destination; and if the conductor undertakes to put him off, on the ground that he is not entitled to travel thereon, he may resist force with force; but if the conductor stops the train on his account, and undertakes to detach the mail car therefrom and send it on with the mail, he has no right to prevent him from so doing, and if he does he may be prosecuted for stopping the mail. *United States v. Kane*, U. S. D. C. D. Oreg. Jan. 26, 1884.

13. CRIMINAL LAW—TWICE IN JEOPARDY—NEW TRIAL.

The plea of once in jeopardy is not sustained by proof of a former trial of the same indictment, with a verdict of guilty set aside, on motion of the defendant, for misconduct of a juror. *State v. Blaisdell*, S. C. N. H. Reporter's Advance Sheets.

14. CRIMINAL PRACTICE—JOINT TRIAL—RIGHT OF CHALLENGE.

Where several defendants are tried jointly for a crime, having waived their right to separate trials, they are only entitled to challenge jointly, and may have the same number of challenges as if it were a single defendant being tried. *People v. O'Laughlin*, S. C. Utah, 1 Pac. R. 653.

15. CRIMINAL PRACTICE—NEW TRIAL—SENTENCE.

The omission of the court to ask the prisoner in a murder case, "why sentence should not be passed upon him," entitles him to a re-sentence, but not to a new trial. *State v. Trezevant*, S. C. So. Car. Jan., 1884.

16. DECEIT—RELIANCE UPON FALSE REPRESENTATIONS.

A purchaser of land may rely upon the false representations of a vendor, that the land is free from incumbrances, and need not examine the records. *Wise v. Wright*, S. C. Ind. Jan. 30, 1884.

17. DECEIT—REPRESENTATIONS AS TO QUALITY.

Representations as to the value and utility of a machine however false and exaggerated, are mere matters of opinion upon which the purchaser relies at his peril. *McComas v. Haas*, S. C. Ind. Jan. 30, 1884.

18. DEED—ACKNOWLEDGMENT—OFFICER'S CERTIFICATE—PRIMA FACIE EVIDENCE.

The certificate of the officer taking the acknowledgment of a married woman to a deed, must stand against a mere conflict of evidence as to whether she willingly signed, sealed, and delivered the deed, or had its contents explained to her by the officer, or was examined privily and apart from her husband; and that even if it be only *prima facie* evidence of the facts therein stated, it can not be impeached, in respect to those facts, except upon proof which clearly and fully shows it to be false or fraudulent. *Young v. Duvall*, U. S. S. C. Dec. 17, 1883.

19. DEED—FILLING BLANKS—AUTHORITY TO AGENT TO FILL THEM—FRAUD—INNOCENT PURCHASER.

A gave a deed to B, his agent, with the name of the grantee left blank, for B to fill in the name of such person as should become the purchaser. The agent filled in C's name, who paid no consideration, but this was done for B's benefit. C conveyed to an innocent purchaser, D, for its full value, and then D conveyed to E, who had full knowledge of all the facts. *Held*, that D took a good title, and that E succeeded to it. *Garland v. Wells*, S. C. Neb. Jan. 2, 1884; 18 N. W. Rep. 132.

20. DELIVERY OF CHOSE IN ACTION—DONATIO CAUSA MORTIS.

Where a decedent owned certain choses in action which were not in her possession but were held by her agent for her, and the only evidence of ownership that she had was a letter from the agent acknowledging that he held such choses for her, and she delivered the letter to her mother, intending the choses as a gift *causa mortis*. *Held*, that this delivery was sufficient to constitute a valid *donatio causa mortis*. *Stephenson v. King*, Ky. Ct. App. Nov. 10, 1883; 5 Ky. L. Rep. 374.

21. EQUITABLE EXONERATION.

If a mortgage of the north half of a lot of land, with notice that it is equitably chargeable with and of sufficient value for the payment of a prior mortgage upon the whole lot, becomes the purchaser of such prior mortgage, he cannot in equity enforce it against the south half of the lot. *McEntire v. Parks*, S. C. N. H. Reporter's Advance Sheets.

22. EVIDENCE—DEED FROM THIRD PARTY.

Where a party seeks to prove title and tenders in evidence a conveyance from a third party to himself, it should be received, although the title of the person conveying is not yet established in evidence. *Slack v. Terry*, S. C. Vict. 5 Austral. L. T. 120.

23. EVIDENCE—FRAUDULENT SALE—BURDEN OF PROOF.

When a sale is alleged to be fraudulent as to creditors, the burden of proof is upon the purchaser to show that he paid a valuable consideration. *Lane v. Starky*, S. C. Neb. Dec. 18, 1883; 18 N. W. Rep. 47.

24. EVIDENCE—SIMILAR ACTS.

Upon the issue of whether a person was driving at a certain rate of speed, which he denied, was within the capacity of the horse, evidence of how fast the horse ran at other times is competent. *Whitney v. Leominster*, S. J. C. Mass. 7 Mass. S. Rep. Jan. 31, 1884.

25. EVIDENCE—TESTIFYING FROM MEMORANDA.

A witness cannot be allowed to testify from a copy of memoranda which he took at the time of things happening a year previously, such copy being made during pendency of the suit, merely because the book with the originals was worn out.

Lovell v. Wentworth, S. C. Ohio, Jan. 15. 1884; 4 Ohio L. J. 905.

26. EXEMPTIONS—FRAUDULENT SALE.
The vendee of chattels sold in fraud of the vendor's creditors cannot set up the vendor's right of exemption from attachment in defence of an action by the creditors for the recovery of the property. *Tilton v. Sanborn*, S. C. N. H. Reporter's Advance Sheets.

27. FEDERAL COURTS—NO JURISDICTION OVER STATES.
Under a statute of Georgia, the governor of that State took possession of a railroad therein and sold it to the State. This was done upon a default in the payment of bonds issued by the railroad company, and indorsed by the State, which were a prior lien upon the railroad. The holders of a second series of bonds in an action against the governor and others sought to set aside the sale on the ground of irregularities therein, and on the ground that the State had no constitutional power to purchase, and also to foreclose the mortgage under which their bonds were issued. *Held*, that the State was a necessary party to the action and being so, the Federal courts had no jurisdiction thereof. *Cunningham v. Macon, R. R. Co.* U. S. S. C. Dec. 8. 1883; 29 Alb. L. J. 89.

28. FENCE LAW—DUTY OF SHEEP OWNERS—TRESPASS.
While the owner of cattle may allow them to range at will, such rule does not apply to sheep. Their owners must see that they do not trespass upon unfenced lands. *Willard v. Mathews*, S. C. Col. Dec. Term. 1883. 4 Colo. L. Rep. 402.

29. FRAUD UPON CREDITORS—POSSESSION.
While a retainer of possession is a badge of fraud, the vendee may show that there was a *bonafide* sale, and the rights of the creditors may by such proof be destroyed. *Nelson v. Good*, S. C. So. Car. Jan. 1884.

30. FRAUD—WHEN FRAUDULENT REPRESENTATIONS WILL VITIATE CONTRACT.—
To render a contract void for false representations, they must not only be untrue when made, but they must be known to be so by the person making them, and they must be such as an ordinarily prudent man would rely on as true. *Grier v. Puterbaugh*, S. C. Ill. Jan. 23, 1884. Reporter's Head Notes.

31. HABEAS CORPUS—NO APPEAL LIES IN FAVOR OF GOVERNMENT.
No appeal lies from an order or judgment of the district court, directing the discharge of a prisoner after a hearing on an application for a writ of *habeas corpus*, either by the defendant named in such writ or by the people. *In re Clasby*, S. C. Utah, 1 West. C. Rep. 524.

32. INJUNCTION—REMOVAL OF COUNTY SEAT—REMEDY.
There was an election on the question of relocation of a county seat, which resulted in favor of the proposition. An action was then brought to enjoin county officers from removing their offices, etc., to the place selected, on grounds which would have been available, if at all, in a contest of the election under the statute. *Held*, that the action would not lie. *Scott v. McGuire*, S. C. Neb. Dec. 18, 1883; 17 N. W. Rep. 93.

33. INSURANCE—FIRE—AGENCY—POLICY OBTAINED BY AGENT.
An agent of an insurance company to receive and transmit applications, can not obtain insurance upon the property of others, for his own benefit, without full knowledge and consent of the company; otherwise it will be void. The law will not allow a person to act as agent, when he has an interest adverse to his principal. *Spare v. Home Mut. Ins. Co.*, U. S. C. C., D. Oreg., Jan. 21, 1884.

34. INTEREST—RATE AFTER MATURITY.
A note bears the agreed rate of interest after as well as before maturity. *Kellogg v. Lavender*, S. C. Neb., Dec. 18, 1883, 17 N. W. Rep., 88.

35. LIBEL—PRIVILEGED COMMUNICATION — SENDING LETTER TO WRONG PERSON.
If one writes a letter containing defamatory statements, to one who has an interest therein by reason of which fact the law protects it as privileged, he will not be liable if he, by mistake, places the letter in an envelope addressed to a stranger who receives it and reads it. *Tompson v. Dashwood*, Eng. H. Ct., Q. B. Div., 48 J. P., 55.

QUERIES AND ANSWERS.

QUERIES.

No. 7. By a statute, no grace is allowed on sight drafts. Is a draft thirty days after sight (duly accepted) entitled to grace, when the thirty days has expired? Give cases in point, no confounded general references. KANSAS.
Wichita, Kas.

No. 8. Can the junior attaching creditor before judgment, enjoin the senior attaching creditor from prosecuting his attachment suit? If so, what facts will justify the granting of such an injunction? Cite authorities. A. M. C.
Fort Worth, Texas.

No. 9. A brings suit as a railway company for damages for tort committed by its conductor, whilst suit is pending, and before any trial, the road goes into the hands of a receiver. *Quære.* Must the receiver be made party defendant? Could execution issue against the property of the road? If the judgment is partly for punitory damages, will the receiver be responsible for that? G.
Corsicana, Tex.

10. A, by absolute deed, without reservation, conveys to B a tract of land, and takes B's note for purchase money; A sues and recovers judgment on note with decree to enforce lien against the land. Is A's implied vendor's lien merged in the judgment lien? If A fails to revive this lien, does he not lose all vendors and judgment liens against land after three years from date of judgment? X.
Fulton, Mo.

11. A conveys real estate to B with condition subsequent. B fails to perform condition. A makes demand for possession for non-performance of condition, but does not get actual possession. A becomes of unsound mind after demand, and guardian is appointed, who accepts the performance of condition after condition broken and forfeiture as aforesaid. A dies. Are the heirs estopped from gaining possession of said real estate by reason of the acts of the guardian, or, in other words, do the acts of the guardi

waive the forfeiture incident to the demand and entry of A? Please cite authorities at an early date.

Vincennes, Ind. J. N.

RECENT LEGAL LITERATURE.

WARVELLE'S ABSTRACTS OF TITLE. A Practical Treatise on Abstracts and examination of Title to Real Property, with Forms and Precedents. By George W. Warvelle, Chicago: Callahan & Co., 1883.

The practical value of real property law is seen in its application in the examination of titles. Since the subject of real property is the most difficult, complicated, technical and comprehensive branch of our jurisprudence, the only corallary would seem to be that examiners of titles should be the most thoroughly familiar with the law; and yet, how far from true it would be to claim that such is the fact. On the contrary, men entirely unacquainted with the law both in its theory and its application are scattered all over the country, almost monopolizing the business of the examination of titles.

The land traffic is of primary importance in every new country. Every sale requires an examination of title. Every purchaser must know what he is receiving. The land may be burdened by something of a doubtful character. The chain of title may have a doubtful link by reason of a peculiar clause in a will or deed. Is it free from attacks from every quarter? A thousand and one questions of law present themselves, and the result must be that the lay examiners are "all at sea." They can not be competent, (1) because defects can be presented only to minds who are conscious of what constitutes a defect; (2) because, if it did suggest itself, he would be at a loss to remove it. In England, the mechanical work only is done by the examiner, who reports, at length, all he finds to a learned counsel, who passes upon the title. That is the only proper system; and it is a discredit to the profession that its members should be engaged in the trial of petty causes, while the most difficult branch of purely legal employment should be in the hands of laymen, who have no knowledge of the law, and play upon the outskirts.

In the work before us, while the author has covered very little new ground, he has presented us the law of real property from a practical standpoint, in such a method that, beyond doubt, the object will be attained. The ancient law has been properly cast aside, and the modern law, as applicable to titles, as they exist, is presented in a methodical manner, in plain, easy diction, and very concisely. The way the "skein of title" becomes entangled by descents, devises, claims under marital rights, exemptions, mortgages, leases, mechanics and vendor's liens, judgments and decrees, judicial and execution sales, tax seizures, judicial proceedings generally and prescriptions, is very nicely illustrated. If we must have these "quack" land lawyers, let them be equipped with books like this. It is provided with an excellent index and the suggestions and forms are valuable. Mr. Warvelle may well be proud of his first essay in the field of legal literature, and we doubtless shall here from him again, before the returns are all in. The publishers deserve some notice but all we can add is that they are entitled to the same praise, the book being handsomely printed and bound. The reputation of this firm is too well established to expect work of a different character from their quarter.

ONE HUNDRED AND NINTH UNITED STATES. United States Reports, vol. 109 Part 1. Cases Adjudged in the Supreme Court from October 15 to October 29. 1883. J. C. Bancroft Davis, Reporter. New York and Albany, Banks and Brothers: 1884.

The enterprise of the publishers and the new reporter is commendable in furnishing the advance sheets of the Supreme Court, in so short a time after the preparation of the opinions by the judges themselves. The only notable cases in these sheets are the civil rights cases to which sixty pages are devoted. The law journals will be obliged to take stimulants or the publishers of the reports will overtake them.

NOTES.

——Two men of national reputation have recently been called to another world. Wendell Phillips the orator, abolitionist, probibitionist, labor agitator, breathed his last on the 2nd. inst. He was a fanatic in every movement in which he engaged, and was what is popularly termed an "irreconcilable." He was admitted to the Boston bar, but relinquished practice on the ground that he could not support a constitution which permitted the existence of slavery. He never appeared in court but once, and then as counsel in a suit in which he was interested as trustee for the colored race. His action with reference to his practice was characteristic of the man. He affiliated with so many parties of late years that he practically lost the attention, if not the respect of the better classes. While in his last years he was known as "the common scold," the voice of Wendell Phillips was always dreaded. Many a politician will rejoice that the silvery voice and the able pen of the once frantic abolitionist will no more charm the ears and minds of the multitude.

——Orlando F. Bump, Esq., of Baltimore, Md., author of works of Bankruptcy, etc. etc., and Register in Bankruptcy, was, on the 29th ult. cut down by the merciless hand of old Father Time in the prime of his life. He had enjoyed but forty-three years of this life, but his constitution was always so delicate that it was a surprise that he held out so long.

——One of the largest verdicts on record, recovered in actions against railroad corporations for personal injuries, was lately recovered in Boston, it being for the sum of $29,800. The largest verdict on record for libel viz. $20,000, was also recovered in the same city. The jury system in Boston evidently demands attention.